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Atorneys for Defendants  
COUNTY OF SACRAMENTO and ANNE MARIE SCHUBERT  
*Exempt from Filing Fees Pursuant to Government Code § 6103*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ARNOLD ABRERA.

CASE NO. 2:22-cv-01162-DAD-DB

**Plaintiff:**

v.

**DEFENDANTS ANNE MARIE SCHUBERT  
AND COUNTY OF SACRAMENTO'S REPLY  
TO OPPOSITION TO MOTION TO DISMISS  
PLAINTIFF'S SECOND AMENDED  
COMPLAINT**

GAVIN NEWSOM, in his official capacity as Governor of the State of California; et al.,

Date: May 21, 2024  
Time: 1:30 p.m.  
Courtroom: 4

## Defendants

Complaint Filed: 7/5/22  
First Amended Complaint filed: 9/2/22  
Second Amended Complaint filed: 2/13/24

Defendant ANNE MARIE SCHUBERT<sup>1</sup> in her official capacity as County of Sacramento District Attorney and Defendant COUNTY OF SACRAMENTO hereby submit the following Reply to the Opposition to Defendants' motion to dismiss the Second Amended Complaint of Plaintiff ARNOLD ABRERA.

## I. SUMMARY

Defendants moved to dismiss arguing Plaintiff has no standing to challenge California Welfare and Institutions Code sections 5150 or 8102, that this court should abstain from jurisdiction, and/or that

<sup>1</sup> As previously noted, Ms. Schubert is no longer the elected District Attorney. Thien Ho was elected District Attorney of Sacramento County in 2022, and officially took office in January 2023.

1 the Eleventh Amendment bars this action and the Ex Parte Young doctrine does not apply.

2 In opposition, Plaintiff largely sidesteps issues by making repeated and generalized references to  
3 the Second Amendment, wholly ignoring arguments and authorities that support dismissal of this action.  
4 Accordingly, Defendants submit the motion should be granted and this action dismissed without leave to  
5 amend.

6 **II. ARGUMENT**

7 **A. The Court should decline jurisdiction under *Penn General***

8 Defendants argued that because this case arises from seizure of personal property by law  
9 enforcement, and California statutory authority under Penal Code section 1538.5 gives jurisdiction to the  
10 state courts for the provision of said in rem matters, this court should decline jurisdiction under *Penn*  
11 *Gen. Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935) citing cases such as *In re Seizure of*  
12 *Approximately 28 Grams of Marijuana*, 278 F. Supp. 2d 1097, 1106–07 (N.D. Cal. 2003).

13 In opposition, Plaintiff argues the doctrine of *Penn General* does not apply because there is no  
14 longer pending in rem proceedings in state court. This argument misses the mark and wholly ignores the  
15 numerous cases cited by moving defendants that the California courts retain jurisdiction over seized  
16 property. Accordingly, this court must therefore decline jurisdiction.

17 **B. Alternatively, Rooker/Feldman Abstention applies**

18 Defendants argued that the Rooker-Feldman doctrine bars this court from disturbing the state  
19 court decision to not return the firearms. Plaintiff argues his federal claims arise independently.

20 This argument theoretically could be true but for the fact that the SAC is replete with pleas to  
21 have the firearms returned, which clearly implicates that such effectively seeks to usurp/overtake the  
22 denial of the motion to return the rifles in state court. Accordingly, the Rooker-Feldman doctrine  
23 applies.

24 **C. Collateral Estoppel/Issue Preclusion**

25 Defendants alternatively argued that Plaintiff was collaterally estopped from challenging the  
26 denial of the return of the weapons, as the state court has already done so. Plaintiff cavalierly dismisses  
27 the argument because he brings “federal claims”, which of course wholly ignores Plaintiff seeks return  
28 of the weapons.

1       **D. The claims are not ripe because Plaintiff has not alleged compliance with California Penal  
2       Code Sections 12021.3.1 and 33850 to legally lay title to the two rifles, and his alleged  
3       refusal to do so warrants dismissal; and/or because he is pursuing return in state court**

4              Defendants argued that because Plaintiff does not allege he complied with registration under the  
5       California's Assault Weapons Control Act ("AWCA"), California Penal Code section 12275 et seq.,  
6       there are insufficient allegations Plaintiff sought a determination from the State whether he is lawfully  
7       entitled to return of the assault weapons seized, such that the claims for the return of the weapons are not  
8       ripe.

9              Plaintiff in opposition argues without authority that he need not register because he "challenges  
10       that process in his complaint" but fails to cite any place in the SAC where he actually does so.  
11       Defendants submit a thorough search of the SAC fails to show any such challenge. Indeed only  
12       California Penal code section 33850 is mentioned once in Paragraph 204, under the ninth claim for  
13       "application for return of firearms", which is otherwise barred as argued above.

14       **E. Plaintiff does not have Article III standing for facial challenges and/or the Second  
15       Amendment does not protect the right to possess specific firearms**

16              Defendants argued that Plaintiff does not have Article III standing to challenge California  
17       Welfare and Institutions Code sections 5150, or 8102, because these sections were applied to his wife,  
18       Plaintiff does not allege to be mentally ill or subject to said statutes, and/or because section 8102 is  
19       "outside the Second Amendment" as found by *City of San Diego v. Boggess*, 216 Cal. App. 4th 1494,  
20       1500 (2013) because keeping a firearm away from a mentally unstable person is a reasonable exercise of  
21       the police power, and/or because the Second Amendment "does not protect the right to  
22       possess specific firearms" citing *Rodriguez v. City of San Jose*, No. 5:15-CV-03698-EJD, 2017 WL  
23       4355095, at \*2 (N.D. Cal. Sept. 29, 2017) (emphasis in original), *aff'd*, 930 F.3d 1123 (9th Cir. 2019),  
24       and *aff'd*, 773 F. App'x 994 (9th Cir. 2019) (affirming dismissal of claim by spouse of a person whose  
25       firearms were confiscated under section 8102 as having a Second Amendment right to the return of  
26       those confiscated firearms) and *Walters v. Wolf*, 660 F.3d 307 (8th Cir. 2011) (no violation of the  
27       plaintiffs' Second Amendment rights because the government's retention of a confiscated firearm did not  
28       prohibit Walters from retaining or acquiring another firearm) and *Rodgers v. Knight*, 781 F.3d 932, 941-  
942 (8th Cir. 2015) ("the unlawful retention of specific firearms does not violate the Second

1 Amendment, because the seizure of one firearm does not prohibit the owner from retaining or acquiring  
2 other firearms.”

3 In opposition, Plaintiff conveniently ignores all the above authorities without actually addressing  
4 the principles of Article III standing in terms of California Welfare and Institutions Code sections 5150  
5 or 8102. This failure should be viewed as a concession. For these additional reasons, the SAC should  
6 be dismissed.

7 **F. Plaintiff’s claims against the District Attorney in her official capacity for prosecuting  
8 crimes and any claimed policies for gun prosecution is tantamount to an action against the  
9 State of California, to which Monell does not apply**

10 Defendants argued that the second, fourth, seventh, ninth, tenth, eleventh, twelfth, thirteenth,  
11 fifteenth, and sixteenth claims for relief against the District Attorney or the “County” are based on  
12 multiple conclusory allegations about prosecutorial policies that are those of the State, not the County,  
13 and because of that *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) does not apply.

14 In opposition, Plaintiff fails to adequately address how any of the claimed policies (which  
15 Defendants maintain are related to the prosecution of crimes) are NOT those of the State, not the locality  
16 in which the District Attorney is situated. As such, he effectively concedes the issue. See e.g. *In re  
17 Bowman*, 630 F. Supp. 3d 1216, 1221, n.5 (N.D. Cal. 2022) (finding the failure to adequately address  
18 and issue amounts to a concession on the point). Defendants submit the second, fourth, seventh, ninth,  
19 tenth, eleventh, twelfth, thirteenth, fifteenth, and sixteenth claims for relief against the District Attorney  
or the “County” claims Defendants should be dismissed.

20 **G. Plaintiff’s claims for damages are barred by Eleventh Amendment Immunity**

21 Defendants argued that where Plaintiff seeks damages against the District Attorney in her official  
22 capacity, such is barred by the Eleventh Amendment based on clear authority that prosecution of crimes  
23 is State function.

24 In opposition, Plaintiff concedes the issue. (Opposition, p 5). The motion therefore should be  
25 granted.  
26 ///

27 ///  
28

1           **H. Declaratory relief against the District Attorney is not appropriate under the Ex Parte  
2 Young doctrine exception to Eleventh Amendment immunity**

3           Defendants argued that the *Ex parte Young* doctrine did not apply the District Attorney in her  
4 official capacity as arising from the enforcement of California Welf. & Inst. Code, §§ 5150 and 8102,  
5 because the District Attorney has no connection with the enforcement of those sections, and merely  
6 because California Penal Code section 30800 authorizes a District Attorney to file a civil action in lieu  
7 of prosecution is not sufficient to trigger the *Ex parte Young* exception to the Eleventh Amendment  
8 because there are no allegations that Plaintiff has been threatened with a petition under California Penal  
9 Code section 30800. Accordingly, the claims are not subject to the *Ex parte Young* exception to the  
Eleventh Amendment, and should be dismissed.

10          In opposition, Plaintiff fails to address the issues as raised, instead reiterating that Plaintiff is  
11 seeking return of his firearms. (Opposition, p.6). Defendants submit the lack of substantive argument as  
12 to the application of the Eleventh Amendment acts as a concession to its merits, and thus the action  
13 should be dismissed.

14          **I. Plaintiff's claims challenging California Code of Civil Procedures 1021.11 should be  
15 dismissed as moot**

16          Defendant argued that as the Ninth Circuit noted in the appeal in this case, in light of the  
17 permanent injunction issued in *Miller v. Bonta*, No. 22-cv-1446, 2022 WL 17811114 (S.D. Cal. Dec. 19,  
18 2022), which enjoins enforcement of California Code of Civil Procedures 1021.11, these claims are now  
19 moot. Plaintiff in opposition argues that a state court could ignore the decision of lower federal courts.  
20 That may be true, but this case is venued in federal court and the issue was already adjudicated.

21          **J. The Fifteenth and Sixteenth Claims as arising from the seizure or return of the firearms as  
22 violations of the Fourth, Fifth or Fourteenth Amendments fail to state claims against these moving  
23 defendants**

24          Defendants argued that the Fifteenth and Sixteenth Claims as arising from the seizure or return  
25 of the firearms as violations of the Fourth, Fifth or Fourteenth Amendments fail to state claims against  
26 these moving defendants because (1) the Fifth Amendment only applies to actions by the federal  
27 government and (2) Plaintiff does not allege the District Attorney or the County seized any weapons and  
28

1 thus the claims fail (3) or are barred as argued above.

2 In opposition, Plaintiff insists the claims are valid without any substantive argument or citation  
3 to any authority. Such acts as a concession to the issues. Accordingly, these claims fail and should be  
4 dismissed.

5 **K. The state law claim for inverse condemnation fails to state a valid claim**

6 Defendants argued the claim for inverse condemnation failed to sufficiently state a claim because  
7 (1) Plaintiff is collaterally estopped from asserting this claim based on the denial of the 1538.5 motion,  
8 (2) Plaintiff has not sufficiently alleged lawful ownership of the weapons, or (3) that Defendants  
9 participated in the planning, approval, construction, or operation of a public project or public  
10 improvement as required for such a claim or (4) that such public improvement caused damages, such  
11 that an inverse condemnation does not apply under the allegations of the SAC.

12 In opposition, Plaintiff first argues that an inverse claim can arise from personal property, an  
13 issue the Defendants did not raise or argue in the motion. Otherwise, Plaintiff argues the “enforcement  
14 actions leading to the confiscation and retention of Mr. Abrera’s firearms signify a substantial  
15 governmental engagement, reflecting public policy measures on gun control. This is tantamount to  
16 substantial participation in a public project, satisfying the legal criteria established in *Yamagiwa v. City*  
17 *of Half Moon Bay*, 523 F. Supp. 2d 1036, 1088 (2007).”

18 Plaintiff’s argument stretches credulity and must be rejected. *Yamagiwa* involved property  
19 damage due to flooding from wetlands developed after the City built a public improvement project  
20 along/near a beach, which is factually distinguishable from this case, and wholly fails to speak to an  
21 “enforcement action” or whether such is considered a “public project” or improvement. Plaintiff’s logic  
22 is flawed, and would turn the definition of public project into something unworkable. Accordingly, the  
23 motion should be granted.

24 **L. Plaintiff has no standing to assert injunctive relief**

25 Defendants argued plaintiff must show standing separately for injunctive relief, but fails to do so  
26 because Plaintiff does not state facts establishing a likelihood of any irreparable injury in the future to  
27 justify any form of injunctive relief, and has an avenue of relief for return of property by his motion  
28 under California Penal Code section 1538.5, which this court has no jurisdiction over and/or now

1 Plaintiff is barred from challenging under estoppel or *Rooker/Feldman*.

2 In opposition, Plaintiff does not point to any allegations in the SAC, nor articulate any facts that  
3 establishes a likelihood of any irreparable injury in the future to justify any form of injunctive relief.  
4 Plaintiff ignores that the general rule is that equity will not interfere to prevent the enforcement of a  
5 criminal statute. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 500 (1925). Rather, it must appear  
6 that ‘the danger of irreparable loss is both great and immediate’; otherwise, the accused should first set  
7 up his defense in the state court, even though the validity of a statute is challenged. *Fenner v. Boykin*,  
8 271 U.S. 240, 243, 244 (1926). Accordingly, any request for injunctive relief should be dismissed.

9

10 Respectfully submitted,

11 Dated: April 1, 2024

12 PORTER SCOTT  
13 A PROFESSIONAL CORPORATION

14 By /s/ John R. Whitefleet  
15 John R. Whitefleet  
16 Attorney for Defendants SCHUBERT and  
17 COUNTY OF SACRAMENTO